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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1183

FRED M. WEEMS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT E. KENDRICK
Deputy Attorney General
State of Tennessee
215 Supreme Court Building
Nashville, Tennessee 37219

WILLIAM C. KOCH, JR.
Assistant Attorney General
State of Tennessee
417 Supreme Court Building
Nashville, Tennessee 37219

OF COUNSEL:

DAVID M. PACK
Attorney General
State of Tennessee

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee. Phone 525-4202

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STATEMENT OF THE CASE

The Petitioner and his son were jointly indicted by the Greene County, Tennessee grand jury at its May, 1971 term charging them with murder in the first degree. Upon their pleas of not guilty, the trial commenced on December 4, 1972 and continued through December 9, 1972 when, after due deliberation, the jury found the Petitioner guilty of voluntary manslaughter and fixed his punishment at not more than three years in the State Penitentiary. The Petitioner's son was found guilty of involuntary manslaughter and was sentenced to thirty days in the county jail.

The Petitioner duly perfected an appeal to the Tennessee Court of Criminal Appeals at Knoxville, Tennessee.[1] On September 17, 1973, that court, in a unanimous opinion written by Judge William S. Russell, affirmed the Petitioner's conviction. Subsequently on November 5, 1973, the Supreme Court of Tennessee denied the Petitioner's Petition for Writ of Certiorari without a written opinion. Thereupon, in an order dated November 14, 1973, Judge O. Wayne Oliver of the Tennessee Court of Criminal Appeals allowed the Petitioner to remain on bond pending the filing of a Petition for Writ of Certiorari in the United States Supreme Court.

QUESTIONS PRESENTED

I.

Whether the exclusion of the names of persons between the ages of 18 and 21 from the jury selection process is violative of the "defendant's" Fourteenth Amendment right to Due Process.

II.

Whether the returning of inconsistent verdicts against the "defendant" and his codefendant under State Law is violative of the "defendant's" Fourteenth Amendment rights to Due Process.

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[1] The Petitioner's son, John Dallas Weems, waived his right to appeal his conviction for involuntary manslaughter. In an order dated June 25, 1973, the Tennessee Court of Criminal Appeals allowed John Dallas Weems to withdraw his appeal and affirmed his conviction for involuntary manslaughter.

STATEMENT OF THE EVIDENCE

The ill-will between the deceased and the Petitioner's family culminated on June 15, 1971 when the deceased and the Petitioner's wife exchanged insults at a drive-in market near the Petitioner's liquor store. During this heated exchange, the Petitioner's son ran to his father's store to report what was happening.

Upon hearing of the incident, the Petitioner picked up a high powered rifle, and both he and his son, who had armed himself with a pistol in the meantime, left in his son's automobile, accompanied by another individual. They finally located the deceased driving along a county road. They began to fire upon the deceased's car, and, after a high-speed chase during which several more shots were fired, they watched the automobile swerve off the road and come to rest in a ditch. Neither the Petitioner nor any of his companions stopped to assist the deceased who died from a gunshot wound in the head.

The Petitioner testified at the trial that he went after the deceased because he wanted to "talk" with him. He said that he shot at the deceased's car only to shoot out the tires and explained that he did not stop to aid his victim because he was afraid of a trap.

The Petitioner returned home following the shooting and reported what he had done to the police. He freely admitted shooting at the deceased but raised the claim of self-defense. Earlier in the evening, the Petitioner had told a police dispatcher that he would kill the deceased if he saw him again; when the Petitioner called the police after the shooting, he said he had made good on his threat.

REASONS FOR DENYING THE WRIT

There are four reasons why the Petitioner for Writ of Certiorari should be denied:

(1) The group of individuals between eighteen (18) and twenty-one (21) years of age do not constitute a "recognizable class".

(2) There is no evidence in the record of purposeful, systematic exclusion of any eligible class from service on the petit jury.

(3) The Petitioner has never questioned in any state proceeding the constitutionality of the allegedly "inconsistent" verdicts.

(4) Consistent verdicts are not constitutionally required in criminal proceedings.

ARGUMENT

I. THE STATE TRIAL COURT CORRECTLY OVERRULED THE PETITIONER'S UNTIMELY CHALLENGE TO THE SPECIAL VENIRE BASED ON ALLEGATIONS OF SYSTEMATIC EXCLUSION OF PERSONS BETWEEN EIGHTEEN AND TWENTY-ONE YEARS OF AGE FROM THE PETIT JURY.

The Petitioner claims that his conviction for voluntary manslaughter must be overturned because there were no prospective jurors between eighteen (18) and twenty-one (21) years of age on the special venire. The Petitioner's trial counsel raised this question on the day the trial commenced even though he had previously been aware that the effective date of T. C. A. §1-313 was May 11, 1971.[2] (Ap-

[2] T. C. A. §1-313. Eighteen year olds - Legal responsibility. - "Notwithstanding any laws to the contrary, any person who is eighteen (18) years

(Continued on following page)

pendix A p. 5a, BE. 9) In response to this delayed challenge to the array, the trial judge stated:

> "Back quite some time ago on September 11, 1972 all parties agreed that this case be tried on December 4 that there be a special venire and a hundred additional jurors for December 4 and a hundred for December 5 and a hundred for December 6. *I take it you've known all along what you just stated to the Court.*" *(Emphasis added.)*
>
> Appendix A p. 5a, BE. 8

The parties proceeded to select a jury from December 4, 1972 to December 7, 1972 during which time the Petitioner failed to utilize all his peremptory challenges. After the jury had been selected, the Petitioner again challenged the array alleging the exclusion of newly-enfranchised eighteen to twenty-one year olds. (Appendix A p. 10a-11a, BE. 15-16)

To prove these allegations, the Petitioner showed that the jury box from which this special venire had been chosen had been filled in compliance with all state procedural requirements on August 30, 1971, approximately four months after the effective date of T.C.A. §1-313. (Appendix A p. 17a, BE. 24) The jury box had not been reopened since that time. (Appendix A p. 12a, BE. 18) Further, one of the duly appointed jury commissioners stated that he was unaware of T.C.A. §1-313 when the box was filled. (Appendix A p. 14a, BE. 21) He also stated that he did not attempt to exclude any group of individuals when the jury

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(Continued from preceding page)

of age or older shall have the same rights, duties and responsibilities as a person who is twenty-one (21) years of age or older." [Acts 1971, ch. 162, §3.]

box was filled. (Appendix A p. 15a, BE. 22) The Petitioner proffered no proof concerning Greene County's method of finding names from which the jury lists were compiled, nor did he show what percentage of the residents of Greene County were between eighteen and twenty-one years of age. After the Petitioner introduced this evidence, the trial court overruled his challenge and stated:

> "With those agreements [September 11, 1972] and knowledge of those things the Court had no previous notice that such a motion would be filed putting Greene County to the extensive expense of having all these jurors coming into this Court at eight dollars a day plus mileage. The Court holds that it is the duty of counsel on either side when some special matter is brought before the Court's attention that sufficient notice be given to the Court so the Court can act on it in an orderly way, and for all these reasons the Court denies your motion."
>
> Appendix A p. 19a, BE. 28-29

Thus it is clear that the Petitioner should not be allowed to raise the "systematic exclusion" question in this Court because of his failure to assert the claim in a timely manner. Petitioner's trial counsel admitted having prior knowledge of the enactment of T.C.A. §1-313, yet he failed to raise the issue during the three months between arraignment and trial. In fact, the Petitioner's counsel affirmatively abandoned this claim by agreeing that a special venire should be called, knowing full well that the prospective jurors would be called from the very jury list he is now attacking.

It is firmly established that in order to show a constitutional infirmity in the jury selection process, the Petitioner must prove two things; first, that the group of persons allegedly excluded constitute a recognizable class;

then, if he is successful in showing this, he must show that members of this class have been systematically excluded from jury service. *Hernandez v. Texas*, 347 U.S. 475 (1954). The Petitioner has the burden of showing that his constitutional rights have been violated because of such systematic exclusion. When the Petitioner has failed to carry this burden, this Court has consistently refused to assume that systematic exclusion took place. *Alexander v. Louisiana*, 405 U.S. 625 (1972). The Petitioner has failed to show either that eighteen to twenty-one year olds comprise a recognizable class or that the Greene County Jury Commission systematically excluded any recognizable group of individuals from jury service. *Shadden v. State*, 488 S.W.2d 54, 60 (Tenn. Crim. 1972).

Virtually every court addressing itself to the question of whether individuals between eighteen and twenty-one years of age comprise a recognizable class has held that no such group exists. *Wilkins v. State*, 16 Md. App. 587, 300 A.2d 411, 417 (1973); *State v. Stewart*, 120 N.J. Super. 509, 295 A.2d 202, 203 (1972); and *People v. Hoiland*, 22 Cal. App. 3d 530, 99 Cal. Rptr. 523 (1971). Further, this Court has refused to consider this question in at least five recent cases. *White v. Georgia*, —— U.S. ——, 94 S. Ct. 22, *reh. denied* ... U.S. ..., 94 S. Ct. 607 (1973; *United States v. Olson*, 412 U.S. 905 (1973); *United States v. Gooding*, 412 U.S. 928 (1973); *Teleprompter Corporation v. United States*, 411 U.S. 932 (1973); and *United States v. Ross*, 410 U.S. 990 (1973).

While this Court has never specifically addressed itself to this question, at least three Justices have rejected the concept that age was a "suspect classification" thereby refusing to uphold the congressional determination that the ineligibility of eighteen to twenty-one year-olds to vote in State elections interfered with their constitutional rights

under the Equal Protection Clause. *Oregon v. Mitchell*, 400 U.S. 112 (1970). Just as classifications based on age are not suspect, age classifications should not be considered recognizable for purposes of raising a "systematic exclusion" claim.

In the face of the legal authority to the contrary, the Petitioner's mere assertion that individuals between eighteen and twenty-one years of age form a recognizable class must fall. The Petitioner has failed to show any identifiable relationship among the members of the class other than age—a relationship constantly in a state of flux. Unlike other recognizable classes whose membership is fixed at birth, the membership of this class changes daily thus rendering it "unrecognizable" from one day to the next.

However, even if this group could be considered a recognizable class, it is clear that the Petitioner has failed to prove that its members were systematically excluded from serving on the petit jury. The Petitioner's claim is based solely on his showing that T.C.A. §1-313 was enacted approximately four months before the Greene County jury box was filled. This lapse of time is not sufficient, by itself, to prove systematic exclusion. *United States v. Gooding*, 473 F.2d 425, 430 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973) and *State v. Kirby*, 15 N.C. App. 480, 190 S.E.2d 320 (1972).

The Petitioner offered no proof concerning how the Greene County Jury Commission obtained names to be included in the jury box from which the special venire was drawn. Assuming that Greene County used the voter registration lists to compile the jury list,[3] the fact that

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[3] T.C.A. §22-228 provides in pertinent part: "Said board of jury commissioners . . . shall then and there select, from the tax records and the

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the voter lists themselves may have not contained the names of individuals between eighteen and twenty-one years of age will not support a charge of systematic exclusion unless it has been shown that the voting lists themselves reflect discriminatory practices. *United States v. Dellinger*, 472 F.2d 340, 365-366 (7th Cir. 1972).

No such discriminatory practices were alleged or proved in this case; thus this Court must assume that the name of every newly-enfranchised voter who had registered within the four month period would appear on the voter list. Thus, individuals under twenty-one years of age could have been chosen when the box was filled on August 30, 1971. As the testimony of one of the jury commissioners revealed, no attention was paid to an individual's age when the box was filled. (Appendix A p. 14a-15a, BE. 21).

Further, there is no evidence that there was another readily available list from which the jury commission could obtain the names of bona fide county residents between eighteen and twenty-one years of age. The obvious impracticality of attempting to formulate such a list is sufficient to render the Petitioner's claim untenable. *United States v. Guzman*, 468 F.2d 1245, 1248 (2d Cir. 1972).

The fact that there may have been no individuals between eighteen and twenty-one years of age on the special venire is not sufficient to prove systematic exclusion of people within that age grouping since, by law, those members of the class who had registered to vote would have been

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permanent registration records of the county, or other available and reliable sources, a list of names of upright and intelligent persons known for their integrity, fair character and sound judgment who are otherwise legally qualified to serve as jurors . . . to serve as jurors in the circuit and criminal courts of such county for the ensuing two (2) years."

eligible to be chosen. Since the members of this class have the power to exclude themselves merely by not registering to vote, it would be improper to find that any recognizable class exists at all.

II. THE PETITIONER FAILED TO CHALLENGE THE INCONSISTENCY OF THE JURY'S VERDICT IN ANY STATE COURT.

At no time during the proceedings in state court[4] has the Petitioner attacked the constitutionality of the jury's verdict. The Petitioner's failure to question the constitutionality of this allegedly "inconsistent" verdict effectively prevents him from raising the question for the first time in his Petition for Writ of Certiorari in this Court, 28 U.S.C.A. §1257 and Rule 19(1)(a) of United States Supreme Court Rules. See generally *Hill v. California*, 401 U.S. 797 (1971) and *Street v. New York*, 394 U.S. 576 (1969). See also C. A. Wright, Federal Court §107 (Hornbook Series 1963).

III. CONSISTENT VERDICTS IN CRIMINAL PROCEEDINGS WHERE THE DEFENDANTS ARE JOINTLY INDICTED AND TRIED FOR THE SAME OFFENSE ARE NOT CONSTITUTIONALLY REQUIRED.

The Petitioner finally claims that his conviction for voluntary manslaughter violates the Due Process Clause of the Fourteenth Amendment because the same jury found his son guilty of involuntary manslaughter. The Petitioner has failed to demonstrate the abridgment of a constitutional right because consistency in jury verdicts has never been constitutionally required. *Dunn v. United States*, 284

[4]The Motion for New Trial and Assignments of Error on appeal to the Court of Criminal Appeals and Tennessee Supreme Court appear in the Appendix.

U.S. 390 (1931). See also *Jackson v. State*, 477 S.W.2d 213, 215-216 (Tenn. Crim. 1971) and *Wiggins v. State*, ___Tenn.___, 498 S.W.2d 92 (1973).

The mere fact that one defendant prosecuted for a joint crime is convicted for a lesser offense than his co-defendant does not mean that the convictions are mutually repugnant or that they were obtained in derogation of some constitutional right. In a case where the actual thief of an automobile was acquitted in a Dyer Act prosecution while the person who received the car from the thief was convicted, the United States Court of Appeals for the Fifth Circuit, citing *Dunn v. United States*, *supra*, held:

> "The rendering of inconsistent verdicts has always been an exclusive privilege and prerogative of the jury, and it is not our duty to unravel the ratiocinations of the jury's collective logic."
>
> *Odom v. United States*, 377 F.2d 853, 857 (5th Cir. 1967).

See also *State v. Holder*, 85 N.M. 397, 512 P.2d 970 (1973) and Annot., 22 A.L.R. 3d 717 (1968).

The Petitioner has completely misrepresented the purpose of T.C.A. §39-109.[5] It does not require that the person allegedly aiding and abetting receive the identical punishment as the principal. *Presley v. State*, 161 Tenn. 310, 30 S.W.2d 231 (1930). T.C.A. §39-109 must be read in harmony with T.C.A. §40-2523[6] whose purpose is

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[5]T.C.A. §39-109. Aiders and abettors deemed principal offenders. - "All persons present, aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders, and punished as such."

[6]T.C.A. §40-2523. Separate verdicts as to different defendants. - "Upon an indictment against several defendants, any one or more may be convicted or acquitted."

to provide a method by which a jury, sitting on cases where defendants are jointly tried, may consider the evidence against each defendant separately. *State ex rel. Myers v. Brown*, 209 Tenn. 141, 351 S.W.2d 385 (1961). Read together, these statutes merely allow the jury to consider the guilt or innocence of each defendant and to punish each defendant separately. When considering the punishment of an alleged aider and abettor separately, the jury is directed by T.C.A. §39-109 to consider the same range of punishment it would consider for a principal. Surely, if it is constitutionally permitted to acquit one defendant and convict the other, it is constitutionally permissible to convict one defendant of a lesser included offense while the other defendant is convicted for a greater one.

When the evidence introduced in this case is considered solely against the Petitioner, it is clear that his conviction for voluntary manslaughter was warranted. The fact that the jury desired to mitigate the punishment of his son in no way vitiates the jury's verdict against the Petitioner which is amply supported by the proof.

CONCLUSION

For the foregoing reasons, Respondent, State of Tennessee, respectfully submits that the Petitioner's rights under the Due Process Clause of the Fourteenth Amendment have not been violated and that, therefore, the Petition for Writ of Certiorari heretofore filed with this Court should be denied.

Respectfully submitted,

ROBERT E. KENDRICK,
Deputy Attorney General

WILLIAM C. KOCH, JR.
Assistant Attorney General
Supreme Court Building
Nashville, Tennessee 37219

Attorneys for Respondent

Appendix

APPENDIX A

[1] **IN THE CRIMINAL COURT FOR GREENE COUNTY, TENNESSEE, AT GREENEVILLE**

STATE OF TENNESSEE

v.

FRED WEEMS
JOHN DALLAS WEEMS

NO. 2550, 2551

BILL OF EXCEPTIONS

The above cause came on to be heard before the Hon. H. C. Smith, Judge of the Criminal Court of Greene County, Tennessee, sitting at Greeneville, on the 4th day of December, 1972, at which time the following proceedings were had, to-wit:

APPEARANCES

For the State of Tennessee:

Hon. Heiskell W. Winstead, Attorney General
Hon. Ben Wexler, Assistant Attorney General

For the Defendants:

Hon. John Armstrong, Attorney at Law
Hon. Fred Hartman, Attorney at Law

[3] WHEREUPON, A ROLL CALL OF JURORS SUMMONED WAS TAKEN BY THE COURT;

The Court: Cases number 2550 and 51. I think they're combined in one indictment. Is the state ready for trial in this case?

Mr. Winstead: Yes, Your Honor.

The Court: Mr. Armstrong, would you have the defendants come around please. Are you ready for the defendants?

Mr. Armstrong: If it please the Court, we have certain preliminary matters to take up with the Court.

The Court: Is anything going on downstairs in the courtroom?

Mr. Armstrong: Not that I know of.

The Court: We need to get these preliminary matters out of the way before we take any further steps.

Mr. Armstrong: Mr. Hartman just reminded me General Sessions Court might be down there.

The Court: But Chancery Court is not in session?

Mr. Armstrong: No.

The Court: All right. Ladies and gentlemen of the jury, we have some preliminary matters to get out of the way. The Court does that as a precautionary matter so that nothing prejudicial to either side may take
[4] place in the presence of the jury. The Court regrets that it's necessary to do it, but there are seats down in the county court room just below, and if you'll go down there, we'll call you back in a few minutes.

WHEREUPON, ALL PROSPECTIVE JURORS RETIRED FROM THE COURTROOM;

The Court: Gentlemen, I'll hear whatever motions. All the jurors are out of the courtroom.

Mr. Armstrong: I'm waiting on Mrs. Pierce to get the file. I want to be sure that these motions have been filed.

The Court: All right.

Mr. Armstrong: If it please the Court, I forwarded a copy of this to the general and to Your Honor. Motion to Dismiss. Comes the defendants through their attorneys and move this Honorable Court to dismiss this action and for cause say: The Supreme Court of the United States

has held the death penalty to be cruel and unusual treatment and in contravention to the Constitution of the United States. *Furman v. Georgia*, 69 S.ct. 5003. Tennessee statutes T.C.A. 39-2405 and 39-2406 denote the death penalty as punishment for murder in the first degree, and as this is a void punishment the statutes are void, and there
[5] is no ascertainable standards of punishment, and the defendants should be released. Respectfully submitted, counsel for the defendant.

Now, if it please the Court, I shall tell Your Honor the history of the motion.

The Court: Don't go all the way back. Just say what is sufficient to it in support of your motion.

Mr. Armstrong: All I want to say is, if it please the Court, that this motion has been consistently filed in the Courts in middle and west Tennessee by the public defender is where I obtained it and it has consistently been overruled by the Trial Courts such as Your Honor and has not been passed upon by any Appellate Court.

The Court: Mr. Armstrong, are you telling this Court that even though the United States Supreme Court has abolished the death penalty that it abolished murder in the first degree?

Mr. Armstrong: I'm telling this Court exactly what I said, if it please the Court. It's been overruled by the Trial Courts—all those Trial Courts in the State of Tennessee, but has not been passed upon by an Appellate Court.

The Court: In our state the punishment has been death by electrocution but it goes on to say if there are
[6] mitigating circumstances life imprisonment or for any period of time over 20 years. The alternative punishment—I've charged that before; I'll charge it again. I'll not charge the jury that they may consider electric chair; of course, they won't. It was in the other charge,

but since that time we have a new ruling on that. I consider such motions—I don't care whether it's public defender or anybody else—as a frivolous motion. Motion is denied, Mr. Armstrong.

Mr. Armstrong: Respectfully reserve exceptions.

Now if it please the Court, we have filed a notice this morning that we give notice prior to the beginning of the selection of jurors in this case that the defendants have examined in detail the list of prospective jurors specially summoned for duty in this case tendered to them by the clerk on Wednesday, November 27, 1972, and to their knowledge the names of no prospective jurors between the ages of 18 and 21 years appear thereon; therefore, upon voir dire examination of those propsective jurors if it should appear that none or a small number are between the ages of 18 and 21 years the defendants prior to the swearing of the jury will file a motion challenging the array of jurors for this reason.

[7] Now if it please the Court, with reference to this motion I think that this motion is well taken. This act was passed on May 11, 1971, from my research of it. The jury box in this county was filled in July or August, 1971. I believe it was July. I checked it this morning. 1971. Some two or three months after the passing of the act. This question was raised at the trial of this case before. If Your Honor remembers, we had Mr. Ray McKay in here and probably used Mrs. Pierce. I've forgotten, but all that time the jury box has not been refilled, and these defendants are entitled to have every person in that jury box who is qualified to serve as jurors. The decisions of the Supreme Court of Tennessee and the Supreme Court of the United States consistently hold that any systematic—they use the word systematic—exclusion of any person—not with reference to race. That's not the question, but the

exclusion of any person who is qualified to serve as a juror. We will be able to show at the conclusion of the selection of the jurors first by asking each one of the prospective jurors his age and then by placing the jury commissioner on the stand that they placed no persons whose age
[8] was under 18 years of age in the jury box, and if they did so, they did so by inadvertent mistake, because the jury box has not been filled, and at the time it was filled they were supposed to put in 18 years old—18 to 21. Now that question has been passed on many, many times in the Appellate Courts and absolutely no person in these boxes would be able to show to the best of our ability under the age of 21.

The Court: The law in this state for many, many years has been that the Circuit Judge and the Criminal Court advise the jury commissioners about filling the box sufficient to last about two years, and then when the box gets down empty they fill it again. No Court so far as I know has told the jury commissioners that right after the law is passed that you're going to have to empty that jury box even though it's full. The law is supposed to make common sense. Back quite some time ago on September 11, 1972, all parties agreed that this case be tried on December 4 that there be a special venire and a hundred additional jurors for December 4 and a hundred for December 5 and a hundred for December 6. I take it you've known all along what you just stated to this Court.

[9] Mr. Armstrong: If it please the Court, I only found out yesterday by talking to Mr. McKay and Mrs. Pierce. I called her on Sunday at her home. I thought the jury box had been refilled, but it has not.

The Court: You told me a little bit ago that you knew about the law that was passed back in 1971, and then you waited until November of 1972 to see whether they put new names in there.

Mr. Armstrong: December. December 3 to be exact.

The Court: Your Motion is denied to the venire.

Mr. Armstrong: We respectfully reserve exceptions.

Now if it please the Court, of course, we will be able to refile it before the jury is sworn. We'll have to under the law. With reference to being ready for trial so far as we know we are ready for trial with the exception of one witness, Mr. Looney Ball who is a very material witness for the defendant. We have subpoena issued for him as of last Wednesday. I called the sheriff personally and gave him certain instructions with reference to this witness, and he has made an unsuccessful attempt to have him summoned. I think he is evading process. I can't swear it. I understand from the sheriff that the officer has been to him home two or three times, and except for that
[10] one question which I will inform Your Honor of as the selection of the jury progresses, we are ready for trial.

The Court: Gentlemen, I don't know how long it will take to get a jury. The jurors are not being interrogated this time about the death penalty. That should save some time.

Mr. Armstrong: They were not interrogated before as I remember, were they?

The Court: Oh, they weren't?

Mr. Armstrong: No, sir.

The Court: I had forgotten about that. Are there any other matters? You and Mr. Hartman represent the defendants, Fred Weems, John Dallas Weems and George Owen Lynch.

Mr. Winstead: Your Honor, when the jury returns the state will move to nolle the case as to George Owen Lynch, one of the codefendants in this case.

Mr. Armstrong: We think that Mr. George Owen Lynch is entitled to a verdict of not guilty. He's been put through a trial once.

The Court: You can raise that question later. I don't think you can ask anymore of the attorney general than to nolle it as this time.

Mr. Winstead: You want him to stand trial with
[11] these other men I suppose.

Mr. Armstrong: He's entitled—if you're going to nolle it—you say you have no case against him, he should have a verdict of not guilty. That's always been the custom.

The Court: I'll take up that matter later. In view of the fact the state is moving to nolle it as to George Owen Lynch, you can raise that question later, but the jurors then will not be qualified except as to Fred Weems and John Dallas Weems. You want to nolle it in the presence of the jury, general?

Mr. Winstead: We nolle it at this time, Your Honor, please. We move to do that now. I assume that the jury at some point will know that the state did move to nolle it.

The Court: Have the jury come in, please, or I guess we might as well take a recess now. We'll be in a recess for about five or ten minutes. I guess all of us need one a little bit.

WHEREUPON, AT 10:20 A.M. COURT RECESSED UNTIL 10:30 A.M. AT WHICH TIME THE FOLLOWING PROCEEDING WERE HAD, TO-WIT:

The Court: Since the Court cannot force women to serve on the jury, they've asked to be excused. I didn't put the ideal in their head. They asked me, so I wanted to make that statement. They came in this morning for
the first time and then we have a gentleman, num-
[12] ber 92, Mr. Hal Hartman who is here now. I haven't passed on Mr. Hartman's qualifications.

WHEREUPON, MR. HARTMAN WAS QUALIFIED FOR JURY SERVICE BY THE COURT;

WHEREUPON, ALL PROSPECTIVE JURORS WERE QUALIFIED BY THE COURT FOR SERVICE IN THE CASE NOW ON TRIAL;

The Court: I qualified them as to all three defendants although George Owen Lynch's case has been nollied. I inquired whether any prospective juror was related to him, he being an original defendant.

Gentlemen, how do you want these jurors drawn—one at a time or fill the box and let you pass on them from there? The names will be drawn out of the box.

Mr. Armstrong: We prefer they be selected and drawn one at a time.

The Court: All right, sir. There are two defendants. You may exercise your challenges in any way you desire, gentlemen.

WHEREUPON, EACH SIDE PROCEEDED TO PASS UPON EACH INDIVIDUAL JUROR AS CALLED AROUND BY THE COURT;

WHEREUPON, AN OFFICER WAS SWORN BY THE COURT TO HAVE CHARGE OF THE ONE JUROR SELECTED;

[13] The Court: Mr. Freshour, as the jurors are selected your meals are provided. I suggest that, Mr. Officer, you take him somewhere close by and for the noon day meal up to one dollar and fifty cents for each of you will be approved. Mr. Freshour, during the lunch hour you'll not talk to anyone about the case—not even the officer about it and not let anyone else talk to you about it. If you get served promptly you might get back here in about an hour, and if you don't get served promptly, take your time. Everyone stand, please. Sheriff, adjourn Court for one hour.

Let me say this to all prospective jurors, the Court wishes to sincerely request that during the lunch hour until you come back here that none of the prospective jurors

discuss any phase of this case, what you've read, heard or seen. It's not a mandatory rule, but I request that sincerely.

WHEREUPON, COURT ADJOURNED AT 12:06 P.M. UNTIL 1:05 P.M. AT WHICH TIME COURT RECONVENED AND THE SELECTION OF THE JURORS CONTINUED;

WHEREUPON, AT 4:49 P.M. THE COURT INSTRUCTED THE FOUR JURORS SELECTED AS TO THEIR OVERNIGHT ACCOMODATIONS;

[14] WHEREUPON, AN ADDITIONAL OFFICER WAS SWORN TO TAKE CHARGE OF THE JURORS OVERNIGHT;

WHEREUPON, AT 5:02 P.M. COURT ADJOURNED TO RECONVENE AT 9:00 A.M., DECEMBER 5, 1972;

WHEREUPON, AT 9:00 A.M., DECEMBER 5, 1972, PURSUANT TO ADJOURNMENT COURT RECONVENED;

WHEREUPON, A ROLL CALL WAS TAKEN BY THE COURT OF ALL NEW JURORS SUMMONED AFTER WHICH SAID JURORS WERE QUALIFIED FOR SERVICE BY THE COURT;

WHEREUPON, THE SELECTION OF JURORS CONTINUED UNTIL 11:54 A.M. AT WHICH TIME COURT ADJOURNED FOR THE LUNCH UNTIL 1:15 P.M. AT WHICH TIME COURT RECONVENED AND THE SELECTION OF JURORS CONTINUED;

WHEREUPON, AT 5:12 P.M. THE EIGHT JURORS SELECTED WERE GIVEN BY THE COURT INSTRUCTIONS AS TO THEIR OVERNIGHT ACCOMODATIONS, AFTER WHICH AT 5:20 P.M. COURT ADJOURNED TO RECONVENE AT 9:00 A.M. ON DECEMBER 6, 1972;

WHEREUPON, AT 9:00 A.M., DECEMBER 6, 1972, PURUSUANT TO ADJOURNMENT COURT RECONVENED;

WHEREUPON, A ROLL CALL WAS TAKEN BY THE COURT OF ALL NEW JURORS SUMMONED AFTER WHICH

SAID JURORS WERE QUALIFIED FOR SERVICE BY THE COURT;

WHEREUPON, THE SELECTION OF JURORS CONTINUED UNTIL 11:30 A.M. AT WHICH TIME COURT
[15] ADJOURNED FOR THE LUNCH RECESS UNTIL 12:45 P.M. AT WHICH TIME COURT RECONVENED AND THE SELECTION OF JURORS CONTINUED;

WHEREUPON, AT 3:45 P.M. THE ELEVEN JURORS SELECTED WERE GIVEN BY THE COURT INSTRUCTIONS AS TO THEIR OVERNIGHT ACCOMODATIONS, AFTER WHICH AT 3:45 P.M. COURT ADJOURNED TO RECONVENE AT 9:00 A.M. ON DECEMBER 7, 1972;

WHEREUPON, AT 9:00 A.M., DECEMBER 7, 1972, PURSUANT TO ADJOURNMENT COURT RECONVENED;

WHEREUPON, A ROLL CALL WAS TAKEN BY THE COURT OF ALL NEW JURORS SUMMONED AFTER WHICH SAID JURORS WERE QUALIFIED FOR SERVICE BY THE COURT;

WHEREUPON, THE JURY SELECTION CONTINUED UNTIL 10:00 A.M. AT WHICH TIME THE TWELFTH JUROR WAS SELECTED AFTER WHICH ALL TWELVE JURORS WERE RETIRED TO THE JURY ROOM;

(JURY OUT)

WHEREUPON, ALL COUNSEL AGREED THAT ONE ALTERNATE JUROR WOULD BE SUFFICIENT;

WHEREUPON, AT 10:20 A.M. COURT RECESSED UNTIL 10:31 A.M. AT WHICH TIME THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

Mr. Armstrong: Before the jury comes back in I want to take up a matter with the Court.

The Court: I'll hear your motion or whatever it is.

Mr. Armstrong: If it please the Court, on December
[16] 7, 1972, at 10:20 A.M. the defendants filed the following challenge to the array: The defendants in accordance with their notice filed prior to the

beginning of the selectio of the jury challenge the entire
array from which the pr spective jurors have been selected
and prior to their having been sworn to try the issues on
the following grounds: That by an act passed by the
General Assembly of the State of Tennessee and approved
by the Governor May 11, 1971, persons from the age of
18 to 21 years became e gible for jury service; That the
jury box of Greene Coun y, Tennessee, was filled in July
of 1971 by the jury comm sioners who did not intentionally
place the names of any ersons therein between the ages
of 18 and 21 years; Tha such action of the jury commis-
sioners in not placing th names of persons between the
ages of 18 and 21 years n the jury box from which the
present panel of jurors as drawn deprived these defend-
ants of a fair and impart al jury of their peers to try their
case selected according o law in violation of their rights
guaranteed to them unde the Constitution of the State of
Tennessee and the Unite States; Wherefore, these defend-
ants move the Court to q ash the present jury panel.

The Court: F or reasons heretofore stated,
your motion is denied.

[17] Mr. Armstrong, g: If it please theCourt, we
Mr. Armstron nce in support of it as we have a
desire to introduce evide d it. We have Mrs. Pierce, the
right to do as I understa ry commission. We have the
secretary by law of the j the only jury commissioner who
jury commissioner here ne of them having passed away
is capable of testifying, nd one of them being too ill to
and now being deceased a Mr. Ray McKay here as a witness
attend Court. We have e and who will testify that no
who we desire to introdu f 18 and 21 name was placed in
person between the ages ce will testify that the jury box
the jury box. Mrs. Pie We desire to introduce that
was filled in July of 1971
and make up the record.

The Court: All right. You may proceed.

THE WITNESS, MRS. BONNIE PIERCE, CALLED BY THE DEFENSE AND HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. ARMSTRONG;

Q You are Bonnie Pierce?

[18] A Yes, I am.

Q And you are the Circuit Court Clerk of Greene County, Tennessee, and also the Clerk of the Criminal Court for Greene County, Tennessee?

A Yes, sir.

Q Mrs. Pierce, how long have you been such Circuit CourtClerk and Clerk of the Criminal Court?

A For better than 12 years.

Q Mrs. Pierce, you as such clerk, of course, by law are secretary for the Greene County jury commissioners?

A That's correct.

Q You attend their meetings?

A I do.

Q Mrs. Pierce, when was the last time that the jury box was filled for Greene County, Tennessee?

A Well, in July of 1971.

Q Has it been filled or added to since that time?

A No, it hasn't.

Q And the present jury that constitutes the jury in this case of the State of Tennessee vs. Fred Weems and J.D. Weems was selected from the panel of jurors placed in the box in July, 1971? Is that correct?

A Yes.

Mr. Armstrong: That's all I care to ask.

[19] CROSS-EXAMINATION

BY MR. WINSTEAD:

Q Mrs. Pierce, do you have any minute entry or anything that would indicate the exact time the jury commission met last time?

A I believe I do. We fill the box every two years, and this is the year they fill it—this next year.

Q And '72 would be the year they fill it?

A No, '73.

Q I was thinking while ago when we were talking about it that it was filled in August of '70?

A No, '71.

Q Would you have any minute entries that would show the exact date and time this jury commission met?

A I'll see if I do. I don't know for sure.

Q Would you please?

A I will.

The Court: Before you go, you don't know the ages of any of these jurors who were selected by the jury commissioners, do you?

A I do not.

The Court: You may get whatever minutes entries the general wants you to.

Mr. Armstrong: While she's doing that may I call Mr. McKay?

The Court: Yes, you may.

[20] THE WITNESS, RAY McKAY, CALLED BY THE DEFENSE AND HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. ARMSTRONG:

Q You are Mr. Ray McKay?

A Yes, sir.

Q You are one of the regularly appointed and acting jury commissioners for Greene County, Tennessee. Is that correct?

A That's right.

Q And I believe one of the other members, Mr. Sam Britton, passed away?

A That's right.

Q And the other gentleman is ill. Is that correct?

A He had an operation.

Q Mr. McKay, you attended the filling of the jury box the last time it was filled in July, 1971. Is that correct?

A I believe that is correct. I wouldn't say the exact date.

Q Regardless of the date—Mrs. Pierce is looking up the exact date, but regardless of that, you attended it the last time it was filled. Is that correct?

A That's right.

Q Mr. McKay, at that time did you intentionally
[21] put in the jury box the names of any persons for jury service between the ages of 18 and 21 years of age?

A You've asked me about the 18. I wouldn't know. I wouldn't know the age of what was put in.

Q To your knowledge did you put anyone in the jury box who was between the ages of 18 and 21—to your knowledge—did you intentionally do that?

A Not intentionally I didn't, no.

Q You didn't intentionally put anyone in the box?

A No. I didn't know.

Q You didn't know that people 18 years of age were qualified for service?

The Court: Mr. Armstrong, I wonder whether intentionally is the right word or not. I'm going to ask some questions about whether any discrimination.

Q I'll ask you this. Did you know at that time the law had been changed to where persons of 18 years of age were eligible for service as jurors?

A No, I did not.

Q You did not put anyone in there to your knowledge—To your knowledge did you put anyone in the box between the ages of 18 and 21?

A No, not to my knowledge. I didn't know the age of a one that was put in.

Q You thought the age was still 21?

[22] Mr. Winstead: Objection.

The Court: Sustained. He said he didn't know the ages of any of them. Go ahead, Mr. Armstrong.

Mr. Armstrong: That's all I care to ask him.

CROSS-EXAMINATION

BY MR. WINSTEAD:

Q Mr. McKay, did I understand you to say, sir, that you did not know the ages of any of the people that whose names were put in the box?

A That's right. I did not.

Q So you were not systematically attempting to exclude any race, creed, color or age at the time?

A I was not.

Q Has it come to your attention that in fact there was a young man that had been in the box—I believe a Tommy Creamer—who wasn't 21?

A I've heard that, but I wasn't in here.

Q Neither yourself nor any of the other commissioners had any intention of excluding any segment of society from serving on jury duty?

A I don't think they did. I know I did not.

REDIRECT EXAMINATION

BY MR. ARMSTRONG:

Q Mr. McKay, you at the time you filled the box were under the apprehension that persons under the age

[23] of 21 years of age were ineligible for service?

The Court: Sustained. He didn't say that.

Mr. Armstrong: May he answer that for the purpose of the record?

The Court: No, sir. He may not. It's an improper question. He said he didn't leave anyone out on account of age, he didn't leave anyone out on account of age, he didn't know the ages of anyone put in the box.

Q All right. What age did you think was the minimum age for requirement . . .

The Court: Objection sustained.

Mr. Armstrong: May I have an answer for the record?

The Court: No, sir. You may not. I think it's improper question based on his previous answer.

Mr. Armstrong: Reserve exceptions. Respectfully reserve exceptions. That's all I care to ask him.

The Court: Mr. McKay, when you filled the box is it 2,000 put in there?

A I believe it's 2,000.

The Court: How long does it take you to screen the citizenship of the county and come up with 2,000 names to put in the box—weeks or months?

A No, not weeks or months, but it takes a little longer than you would think. As you go you will talk.

The Court: But it does take some work?

[24] A Oh, yes, it does, and I try to pick the best.

The Court: Well, the jury commissioners have a difficult time. I know that. We have people of different races come into Court and serve on the jury. We have men and women both. We have Caucasians, and we have Negroes. I think most of them prefer the word black at this time.

Mr. Armstrong: No question is made about that.

The Court: No, and Mr. McKay and his associates have done the best job they could, haven't you, Mr. McKay?

A That's right.

The Court: All right, sir. You may stand aside, sir.

Now do you want to get the minute entry or something in there?

Mr. Winstead: We stipulate at page 81 of Minute Book 38, Greene County Circuit Court, indicates that the jury commissioners had the oath administered to them on August 30, 1971, and that this is the date that they filled the box.

Mr. Armstrong: That's all.

The Court: All right. Your motion is denied, Mr. Armstrong.

You may reserve exceptions.

Mr. Armstrong: We respectfully reserve exceptions.

The Court: All right. Let the jury come in please.

WHEREUPON, THE JURY RETURNED TO THE JURY BOX IN OPEN COURT; THE ATTORNEY GENERAL
[25] READ THE INDICTMENT; THE DEFENDANTS PLEAD NOT GUILTY TO EACH AND EVERY CHARGE AND THE JURORS WERE SWORN;

WHEREUPON, THE ALTERNATE JUROR WAS SELECTED AND HIS DUTIES EXPLAINED BY THE COURT, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

The Court: The attorney general may read the indictment for the benefit of the alternate juror.

Mr. Armstrong: If it please the Court, I would like to have the jury excused for a moment to make a motion.

The Court: You've accepted this alternate juror, haven't you?

Mr. Armstrong: I have, but I desire to make a motion before the jury is sworn.

The Court: I don't know what your motion is ....

Mr. Armstrong: I'll be glad to read it, Your Honor.

The Court: Do you have it written out?

Mr. Armstrong: I'll have to state it. It's renewal of

a motion that I made heretofore. I have to make it before the jury is sworn. I'd like to make it out of the presence of the jury.

The Court: Oh, that's the motion you wish to make?

Mr. Armstrong: Yes.

The Court: All right. No other matter except that?

Mr. Armstrong: No.

The Court: All right. So at this moment you waive the fact that the alternate juror has not been sworn.

[26] Is that correct, sir?

Mr. Armstrong: That's correct.

The Court: So that you can make your motion?

Mr. Armstrong: Yes, sir.

The Court: That's the only purpose of it?

Mr. Armstrong: Yes, sir.

The Court: All right. Gentlemen, you'll not discuss any phase of this case among yourselves. You'll go in the jury room, and I'll call you back shortly.

WHEREUPON, THE JURY RETIRED TO THE JURY ROOM;

Mr. Armstrong: If it please the Court for the purpose of the record and because we believe in the validity of it, the defendants at this time renew their challenge to the array heretofore made on the ground that the defendants in accordance with their notice filed prior to the beginning of the selection of the jury challenge the entire array from which the prospective jurors have been selected including the alternate juror and prior to their having been sworn to try the issues on the following grounds: That by an Act passed by the General Assembly of the State of Tennessee and approved by the governor May 11, 1971, persons from the age of 18 to 21 years became eligible for jury service; that the jury box for Greene County, Tennessee,

[27] was filled in July, 1971. I would like to amend

that to make it August, 1971, by the jury commissioners who did not intentionally place the names of any person therein between the ages of 18 and 21 years of age; That such action of the jury commissioners in not placing the names of persons between the ages of 18 and 21 years in the jury box from which the present panel of jurors was drawn deprived these defendants of a fair and impartial jury of their peers to try this case selected according to law in violation of their rights guaranteed to them under the Constitution of the State of Tennessee of the United States; Wherefore, these defendants move the jury to quash the present jury panel.

Now if it please the Court, to save time may I consider that the evidence that I introduced of Mrs. Bonnie Pierce, the Circuit Court Clerk, the stipulation as to when the jury box was filled in August, 1971, and the testimony of Mr. Ray McKay which already appears in the record and the cross-examination and the questions by the Court of such witnesses as having been again presented at this time with the same actions of the Court?

The Court: You tendered them, and I've heard [28] the proof.

Mr. Armstrong: May I consider them as tendered again?

The Court: Well, you certainly may, but there's no use calling them again. I've heard them.

Mr. Armstrong: And with that we're ready for Your Honor to rule on it.

The Court: All right. Your motion is denied.

Mr. Armstrong: We respectfully reserve exceptions.

The Court: And for the purpose of the record on the 11th day of September, 1972, by agreement of state's counsel and defense counsel this case was specially set for December 4, 1972, and at that time both sides agreed

that in addition to the regular panel to come back on December 4 that a special venire be drawn of 100 jurors for December 4, 100 jurors for December 5, 100 jurors for December 6. With those agreements and knowledge of those things the Court had no previous notice that such a motion would be filed putting Greene County to the extensive expense of having all these jurors coming into this Court at eight dollars a day plus mileage. The Court holds that it is the duty of counsel on either side when some special matter is to be brought before the Court's attention that sufficient notice be given to the Court so the Court can act on it in an orderly way, and for
[29] all these reasons the Court denies your motion.

You may reserve exceptions to the Court's ruling.

Mr. Armstrong: We respectfully reserve exceptions.

Mr. Winstead: Your Honor, while the—Would the Court dictate at this time into the record .....

The Court: A little later I'll dictate. After this juror is sworn and sent to lunch I'll take whatever action is necessary. Let the jury come in please.

* * *

[152] CERTIFICATE

I, the undersigned Darlene Britton, Official Court Reporter for the 20th Judicial Circuit of the State of Tennessee, hereby certify that the foregoing is a true and accurate transcription.

This 9th day of April , 1973.

/s/ Darlene Britton

APPENDIX B

[fol. 1] **IN THE CRIMINAL COURT FOR GREENE COUNTY, TENNESSEE**

STATE OF TENNESSEE

v.

FRED WEEMS &
JOHN DALLAS WEEMS

NO. 2550

MOTION FOR A NEW TRIAL

The defendants move the court to set aside the verdict of the jury and grant them a new trial on the following grounds:

1. There is no evidence to support the verdict of the jury.

2. The verdict of the jury is contrary to and not supported by the law and the evidence.

3. The greater weight of the evidence preponderates against the verdict of the jury and in favor of the innocence of the defendants.

4. The court erred in overruling the motion to dismiss filed by the defendants prior to the empanelling of the jury which is in the words and figures following, to-wit:

"Come the defendants through their attorneys and move this Honorable Court to dismiss this action and for cause say:

That the Supreme Court of the United States has held the death penalty to be cruel and unusual treatment in contravention of the Constitution of the United States (Furman v. Georgia 69-5003)

That Tennessee statutes T.C.A. 39-2405 and 39-2406 denote the death penalty as the punishment for murder in the first degree and as this is a void punishment the statutes are void and there is no ascertainable standard for punishment, and the defendants should be released."

5. The court erred in overruling and denying the motion made by the defendants at the conclusion of the introduction of all the evidence, after argument of counsel and before the court charged the jury which is in the words and figures following, to-wit:

"The defendants, at the conclusion of the introduction of all the evidence, after argument of counsel and before the court charges the jury, move the court:

That the court omit and not charge the underlined portion of the following charge usually submitted to the jury in criminal cases:

[fol. 2] 'The defendant is a competent witness in his own behalf and you will weigh his testimony in the same manner as you do the testimony of other witnesses, *remembering however, that he is a party to the suit and interested in the result of the trial.*

Such portion of the usual and customary charge as is underlined violates the defendant's rights under Article 1, Section 8 of the Constitution of the State of Tennessee and the 5th and 14th Amendments to the Constitution of the United States and deprives such defendants of a fair trial."

Amendment to Motion for New Trial

6. The court erred in overruling the objection of the defendants made after the court charged the jury, to such portion of his charge as is underlined in ground 5 of this motion for a new trial.

Respectfully submitted,

/s/ Fred M. Hartman
/s/ John O. Armstrong
Attorneys for the defendants

IN THE CRIMINAL COURT FOR GREENE COUNTY TENNESSEE

THE STATE v. FRED WEEMS, JOHN DALLAS WEEMS	Charge Homicide

AMENDMENT TO MOTION FOR NEW TRIAL

The defendants amend their Motion for a new trial by adding an addition ground thereto as follows:

7. The court erred in overruling the "Challenge to Array" filed by the defendants December 7, 1972 wherein the defendants complained and excepted to the fact that the names of no persons eligible for jury service between the ages of eighteen and twenty-one years of age were placed in the jury box from which the jurors were chosen upon the trial of this case.

Respectfully submitted,

Fred M. Hartman
John O. Armstrong
Attorneys for Defendants

APPENDIX C

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[1] **IN THE COURT OF CRIMINAL APPEALS AT KNOXVILLE, TENNESSEE**

FRED WEEMS and
J. D. WEEMS,
Appellants,

v.

STATE OF TENNESSEE,
Appellee.

} Greene County No. 74

STATEMENT OF THE CASE
STATEMENT OF THE FACTS
GENERAL CONDUCT OF TRIAL
ASSIGNMENTS OF ERROR
PROPOSITIONS OF LAW
BRIEF AND ARGUMENT

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

This is an appeal by appellant Fred Weems from his conviction for voluntary manslaughter for which he was sentenced to three years in the state penitentiary. It is also an appeal by appellant J. D. Weems from his conviction for involuntary manslaughter for which he was sentenced to thirty days in the county jail.

[2] Trial was held on December 7, 1972 through December 9, 1972 before the Honorable H. C. Smith, Judge of the Criminal Court of Greene County, Tennessee, sitting at Greeneville, with the intervention of a jury.

The appellants filed a motion for a new trial, citing two presently relevant grounds for a new trial, to-wit:

(1) The verdict of the jury is contrary to and not supported by the law and the evidence.

(2) The Court erred in overruling the challenge to the array filed by the defendants December 7, 1972, wherein the defendants complained and excepted the fact that the names of no persons eligible for jury service between the ages of 18 and 21 years of age were placed in the jury box from which the jurors were drawn for the trial of this case.

STATEMENT OF THE FACTS

Marvin Armstrong, a defense witness, testified that on the afternoon of June 15, 1971 he was stopped on two occasions by the deceased and told to convey a threat and derogatory remarks to the appellant Fred Weems (B.E. 200, 199, 201). Mr. Armstrong testified that upon seeing the appellant later in the day he did relate to him the deceased's remarks (B.E. 202). The appellant, Fred Weems, testified that this and other threats made by Lonnie Booker, the deceased, had found their way to him and scared him considerably (B.E. 268, 273). The appellant, Fred Weems,

testified that due to his fear of the deceased he asked his
[3] son to be on the lookout for the deceased that evening and to alert him if he appeared in the area (B.E. 273).

Officer Terry Self, radio operator with the Tennessee Highway Patrol, then testified that at 7:30 P.M. on June 15, 1971 he received a telephone call from appellant Fred Weems. Mr. Self testified that Fred Weems said that the deceased, Lonnie Booker, was in the vicinity and that an officer should come out and see, and if Booker came around him he would kill him (B.E. 55, 56). Acting upon this conversation, Officer Self dispatched Deputy Sheriff Brown to the area where the deceased, Booker, was parked drinking beer with his friend, John W. McClaine. Sheriff Brown engaged the deceased in conversation and asked him to stay out of the Baileytown area that night so as to avoid trouble (B.E. 38). After cruising in the area the deceased and McClaine left and returned to McClaine's house and drank a few more beers (B.E. 70). Shortly thereafter, the deceased left.

Mrs. Charlotte Jones, testified that at about 10:00 P.M. the deceased entered her store and began to make accusations and curse at Mrs. Fred Weems and her son, the appellant, J. D. Weems, who were present in the store (B.E. 90). Mrs. Jones testified that the deceased picked up a chair and threatened to hit Mrs. Weems with it, but that he never actually struck her (B.E. 91). During this altercation the appellant J. D. Weems left and returned to his father's package store. State witness, Billy Spears,
[4] testified that at about 10:15 P.M., J. D. Weems came into the package store where he and Fred Weems were working and told his father to get his gun because "he" was down at the store and had slapped his mother (B.E. 102, 107). According to the testimony of both appellants, Mr. Weems

did nothing for a few moments and then after contemplating his course of action, picked up a rifle and left the store saying he would have to go talk with "him" (B.E. 214, 276). Both appellants testified that after leaving the package store they pursued the deceased's automobile with the sole purpose of overtaking him and discussing their differences (B.E. 236, 284). Mr. Fred Weems admitted to shooting at the deceased's automobile while pursuing him but maintained that his only purpose was to shoot out the tires or gas tank on deceased's automobile to bring him to a halt (B.E. 279, 284, 303). After pursuing the deceased four to six miles and firing numerous shots, the deceased's car ran off the road and came to a half. Afraid of being tricked the appellants proceeded around the Booker's car and returned home without ever stopping. (B.E. 279, 280).

Officer Self testified that later in the evening of June 15, 1971 at about 10:45 P.M. the appellant Fred Weems telephoned him again and told him that he had shot Lonnie Booker just as he had earlier warned that he would (B.E. 56,57). Acting upon this information, Officer Self dispatched Sheriff Brown to Fred Weems' home where he was taken into custody.

[5] GENERAL CONDUCT OF THE TRIAL

On December 4, 1971, prior to the selection of the jurors in this case, defense counsel filed a motion challenging the array on the ground that the jury box, from which the prospective jurors for this case were drawn, was refilled on August 30, 1971 and contained the names of no persons between the ages of 18 and 21 who were eligible to serve as jurors. After stating the motion this colloquy took place between the Court and defense counsel:

THE COURT: The law in this state for many many years has been that the Circuit Judge and Criminal Court advise the jury commissioners about filling the box sufficient to last about two years, and then fill it again. No Court so far as I know has told the jury commissioners that right after the law is passed that you're going to have to empty that jury box even though it's full. The law is supposed to make common sense. Back quite some time ago on September 11, 1972, all parties agreed that this case be tried on December 4, that there be a special venire and a hundred additional jurors for December 4 and a hundred for December 5 and a hundred for December 6. I take it you've known all along what you just stated to this Court.

MR. ARMSTRONG: If it please the Court, I only found out yesterday by talking to Mr. McKay and Mrs. Pierce. I called her on Sunday (Dec.) at her home. I thought the jury box had been refilled, but it has not.

THE COURT: You told me a little bit ago that you knew about the law that was passed back in 1971, and then you waited until November of 1972 to see whether they put new names in there.

[6] MR. ARMSTRONG: December. December 3 to be exact.

THE COURT: You motion is denied to the venire.

MR. ARMSTRONG: We respectfully reserve exceptions. Now if it please the Court, of course we will be able to refile it before the jury is sworn. We'll have to under the law.

On December 7, 1971, defense counsel presented the testimony of one of the Greene County jury commissioners and the secretary to the commissioners to support its challenge to the array. After direct examination by defense counsel and the Court and cross-examination of these witnesses by the Prosecutor, and before the jury was sworn, the defense renewed its motion challenging the array, at which time the trial court stated:

THE COURT: All right. Your motion is denied.

MR. ARMSTRONG: We respectfully reserve exceptions.

THE COURT: And for the purpose of the record on the 11th day of September, 1972, by agreement of State's counsel and defense counsel this case was specially set for December 4, 1972, and at that time both sides agreed that in addition to the regular panel to come back on December 4 that a special venire be drawn of 100 jurors for December 6. With those agreements and knowledge of those things the Court had no previous notice that such a motion would be filed putting Greene County to the extensive expense of having all these jurors coming into this Court at 8 dollars a day plus mileage. [7] The Court holds that it is the duty of counsel on either side when some special matter is to be brought before the Court's attention that sufficient notice be given to the Court so the Court can act on it in an orderly way, and for all those reasons the Court denies your motion. You may reserve exceptions to the Court's ruling.

MR. ARMSTRONG: We respectfully reserve exceptions.

ASSIGNMENTS OF ERROR

I.

APPELLANT FRED WEEMS SUBMITS THAT THE VERDICT OF THE JURY IS CONTRARY TO AND NOT SUPPORTED BY THE LAW AND THE EVIDENCE.

II.

APPELLANTS SUBMIT THAT THE VERDICTS OF THE JURY ARE CONTRARY TO AND NOT SUPPORTED BY THE LAW AND THE EVIDENCE.

III.

APPELLANTS SUBMIT THAT THE TRIAL COURT ERRED IN OVERRULING THE APPELLANTS' CHALLENGE TO THE ARRAY AND IN REFUSING TO GRANT A NEW TRIAL IN THIS CAUSE FOR THE REASON THAT THE PROOF INTRODUCED AT THE HEARING OF THE CHALLENGE TO THE ARRAY SHOWS CONCLUSIVELY THAT THE NAMES OF PERSONS ELIGIBLE FOR JURY SERVICE BETWEEN THE AGES OF 18 AND 21 WERE NOT PLACED IN THE JURY BOX FROM WHICH THE TRIAL JURORS IN THIS CAUSE WERE SELECTED.

APPENDIX D

**IN THE SUPREME COURT
FOR THE STATE OF TENNESSEE
AT NASHVILLE**

GREENE COUNTY NO. 74

FRED WEEMS,
Petitioner

vs.

STATE OF TENNESSEE,
Respondent

**PETITION FOR WRITS OF CERTIORARI
AND SUPERSEDEAS
TO THE CRIMINAL COURT OF APPEALS
AT KNOXVILLE, TENNESSEE**

DALE QUILLEN
Attorney for Petitioner
308 Cavalier Building
95 White Bridge Road
Nashville, Tennessee 37205

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[fol. 1] **IN THE SUPREME COURT FOR THE STATE OF TENNESSEE AT NASHVILLE**

FRED WEEMS *Petitioner*

vs.

STATE OF TENNESSEE *Respondent*

} Greene County No. 74

PETITION FOR WRITS OF CERTIORARI AND SUPERSEDEAS

MAY IT PLEASE THE COURT:

Your petitioner, Fred Weems, respectfully represents and shows to the Court that he was and is very much aggrieved by the opinion rendered against him by the Honorable Court of Appeals on the 17th day of September, 1973. That the Honorable Court of Criminal Appeals affirmed the action of a jury in the Criminal Court of Greene County, Tennessee, which found him guilty of voluntary manslaughter, for which he was sentenced to three years in the State Penitentiary.

[fol. 2] **STATEMENT OF THE CASE**

This was an appeal by appellant, Fred Weems, from his conviction for voluntary manslaughter, for which he was sentenced to three (3) years in the State Penitentiary.

Trial was held on December 7, 1972, through December 9, 1972, before the Honorable H. C. Smith, Judge of the Criminal Court of Greene County, Tennessee, sitting at Greeneville, with the intervention of a jury.

The appellant filed a motion for a new trial, citing two presently relevant grounds for a new trial, to-wit:

(1) The verdict of the jury is contrary to and not supported by the law and the evidence.

(2) The Court erred in overruling the challenge to the array filed by the defendant December 7, 1972, wherein the defendant complained and excepted the fact that the names of no persons eligible for jury service between the ages of 18 and 21 years of age were placed in the jury box from which the jurors were drawn for the trial of this case.

The Court of Criminal Appeals on September 17, 1973 affirmed the conviction of the petitioner.

[fol. 3]

REASON CERTIORARI SHOULD BE GRANTED

Petitioner feels that certiorari should be granted since the Court of Criminal Appeals in its decision and apparently in its consideration ignored the fact that the jury returned an inconsistent verdict against father and son in this case; the father, petitioner Fred Weems, being convicted of voluntary manslaughter and son, J. D. Weems, being convicted of involuntary manslaughter and sentenced to thirty days in the county jail.

Further the Court of Criminal Appeals, by its opinion refused to recognize the existence of eligible jurors in Greene County between the ages of 18 and 21, relying upon the fact that the petitioner had failed to introduce proof at trial during his objection to the exclusion of such persons from the jury panel that such persons indeed existed. Petitioner contends that any Court in this state may take judicial notice that all of its counties have substantial number of citizens between the ages of 18 and 21 years, and might refer, if necessary, to the most recent census reports of the United States Government.

[fol. 4] **ASSIGNMENTS OF ERROR**

I.

PETITIONER FRED WEEMS SUBMITS THAT THE VERDICT OF THE JURY IS CONTRARY TO AND NOT SUPPORTED BY THE LAW AND THE EVIDENCE.

II.

APPELLANTS SUBMIT THAT THE TRIAL COURT ERRED IN OVERRULING THE PETITIONER'S CHALLENGE TO THE ARRAY AND IN REFUSING TO GRANT A NEW TRIAL IN THIS CAUSE FOR THE REASON THAT THE PROOF INTRODUCED AT THE HEARING OF THE CHALLENGE TO THE ARRAY SHOWS CONCLUSIVELY THAT THE NAMES OF PERSONS ELIGIBLE FOR JURY SERVICE BETWEEN THE AGES OF 18 AND 21 WERE NOT PLACED IN THE JURY BOX FROM WHICH THE TRIAL JURORS IN THIS CAUSE WERE SELECTED.

PRAYER

PREMISES CONSIDERED, PETITIONER PRAYS:

1. That a Writ of Certiorari, for which this is the first application, issue from this Honorable Court to the Honorable Court of Criminal Appeals, directing said Court and the Clerk thereof to certify and transmit to this Court the entire record and proceedings in this cause, including the opinion and judgment of the Court of Criminal Appeals.

[fol. 5] 2. That in aid of the Certiorari, a Writ of Supersedeas, for which this is the first application by the petitioner, issue from this Honorable Court to supersede and stay the execution of the subject order of the Honorable Court of Criminal Appeals, pending an expeditious final determination of this cause.

3. That petitioner have such other and further relief to which he may be entitled.

THIS IS THE FIRST APPLICATION FOR THE WRITS OF CERTIORARI AND SUPERSEDEAS IN THIS CAUSE.

Respectfully submitted,

_____

DALE QUILLEN
Attorney for Petitioner

[fol. 6] STATE OF TENNESSEE]
COUNTY OF DAVIDSON]

I, DALE QUILLEN, being first duly sworn, make oath that I am the attorney for the petitioner herein; that I am familiar with the statements and facts contained in the foregoing Petition, and those facts and statements I believe

to be true, except those based on the information and belief of the petitioner, and those I verily believe to be true.

_____

DALE QUILLEN

SWORN AND SUBSCRIBED TO before me this _____ day of _____, 1973.

_____

NOTARY PUBLIC

My Commission Expires:

_____

CERTIFICATE OF SERVICE

I hereby certify that a true and real copy of the foregoing petition has been forwarded to the Honorable David M. Pack, Attorney General for the State of Tennessee, Supreme Court Building, Nashville, Tennessee, on this the _____ day of September, 1973.

_____